



**Muga v Muga (Environment and Land Miscellaneous Application
E002 of 2023) [2023] KEELC 18839 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023
GMA ONGONDO, J
JULY 19, 2023**

BETWEEN

JOSEPH OBUYA MUGA APPLICANT

AND

OSONGO MUGA RESPONDENT

RULING

1. On March 6, 2023, the applicant, Joseph Abuya Muga through HO Mimba and Company Advocates originated an application by way of Notice of motion dated March 2, 2023 pursuant to section 79G of the *Civil Procedure Act* Chapter 21 Laws of Kenya seeking the orders infra;
 - a. That, the honourable court be pleased to grant to the applicant leave to file appeal out of time.
 - b. Costs be provided.
2. The application is rooted in the applicant's supporting affidavit of fourteen paragraphs sworn on even date. He averred, *inter alia*, that he got dissatisfied with the trial court's judgment delivered on August 28, 2022 and wanted to file an appeal but was unable to get money to do so. That he is likely to be evicted from the suit land reference number Homa Bay /Kawere/Konyango/Karanding/2436 where he has been in occupation for over 40 years. Annexed to the affidavit are copies of the said judgment, a letter, title deed and a certificate of official search regarding the suit land in support of the application.
3. By a replying affidavit sworn on May 23, 2023 and filed in court on May 24, 2023 through Quinter Adoyo and Company Advocates, the respondent deposed in part that the application is bad in law, frivolous, vexatious, in want of good faith, an abuse of the court and undeserving of the favourable consideration of this Honourable court. That applicant and his counsel were present during the delivery of the judgment by the trial court and the applicant's right of appeal was pronounced but failed to exercise it. That thus, the application be dismissed with costs.



4. Furthermore, the respondent averred that the inordinate delay of eight months to lodge this application is inexcusable and unjustifiable. That the application has been overtaken by events since the decree in Ndhiwa PMC ELC No 30 of 2019 has been executed hence unmeritorious. In support of the application, he annexed to the affidavit copies of documents marked as “OM1 to OM4” which include; the decree (OMO1) and a certificate of official search in respect of the suit land (OMO4).
5. The application was heard by written submissions further to this court’s directions of March 14, 2023.
6. By the applicant’s submissions dated June 2, 2023, reference is made to the orders sought in the application and that the applicant has been subjected to threats of eviction from the suit land. That the applicant should not be denied his fundamental right to appeal from the trial court’s judgment and that the delay in lodging this application is not inordinate but excusable in the circumstances, among other things.
7. In the respondent’s submissions dated June 12, 2023, two issues including whether the applicant deserves the orders sought in the application, are identified for determination herein. In analyzing the issues against the application, counsel referred to section 79 G (supra) alongside the case of *APA Insurance Co Ltd-vs-Michael Kinyanjui Muturi* (2016) KLR and termed the delay of eight months to mount the application, unjustified and that the application is in want of good faith. That the application is in disregard of the judicial process and should not be entertained at all.
8. I have carefully considered the application, the replying affidavit and the rival submissions. So, is there merit in the application?
9. Notably, section 79 G of the *Civil Procedure Act* Chapter 21 Laws of Kenya stipulates the time for filing of appeals from subordinate courts. In an application such as the present one, the applicant has to satisfy the court that he had good and sufficient cause for not filing the appeal in time.
10. In addition, I take into account Order 50 of the *Civil Procedure Rules, 2010* regarding time in this matter. More fundamentally, that processual as much as substantive justice is the goal of jurisprudence and that Article 159 (2) (d) of the *Constitution of Kenya, 2010* is not a whitewash to fundamental ills; see *Sushil Kumar Sen-vs-State of Bihar* (1975) 1 SCC 774 and *Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko & 2 others* (2013) eKLR.
11. Be that as it may, I bear in mind that extension of time is an equitable and discretionary remedy to a deserving party as held in the case of *Nicholas Kiptoo Arap Korir Salat-vs-IEBC & 7 others* (2014) KLR. That delay for a day will result to dismissal if there is no plausible and satisfactory explanation as noted in *Raphael Musila Mutiso & 3 others-vs-Joseph Ndava Nthuka and another* (2019) KLR.
12. Clearly, there was delay of eight (8) months to generate this application. It was the position of the applicant that due to current economic inflation, that he is a retired teacher and a person of little means, he delayed in lodging this application. Nonetheless, in light of the respondent’s replying affidavit including the contents of paragraph 8 thereof and the obtaining circumstances of the matter, the applicant has not provided a plausible and satisfactory explanation for the delay as I bear in mind *APA Insurance, Salat and Mutiso* cases (*supra*).
13. Moreover, I take into the respondent’s averment at paragraph 11 of his replying affidavit and the certificate of official search (OM-04) annexed thereto. So, I approve the respondent’s assertion that the application has been overtaken by events.
14. It is therefore, the finding of this court that the applicant has failed to demonstrate that he had good and sufficient cause for not filing the appeal within the prescribed time. The application is devoid of merit.



15. Wherefore, this application fails and the same is hereby dismissed.
16. By dint of the proviso to section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya and the decision in *Rai-vs-Rai* (2014) KLR, costs of this application shall be borne by the applicant.

DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JULY 2023

G. M. A ONG'ONDO

JUDGE

